A **CIMB ISLAMIC BANK BHD v. MOHD SAUFI TAIB & ORS**

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
MOHD ZAWAWI SALLEH JCA
B [CIVIL APPEAL NO: W-02-432-02-2013]
21 MAY 2015

TORT: *Negligence – Banker and customer – Delay in clearing of cheques – Subsequent cheques dishonoured – Whether bank owed duty of care to manage*
C *customer's account reasonably and diligently*

TORT: *Defamation – Defence – Qualified privilege – Remarks 'refer to drawer' on cheque – Whether amounted to libel – Whether bank had duty to publish remarks – Whether customer had interest in receiving communication – Whether bank*
D *entitled to rely on defence of qualified privilege – Whether delay in clearing cheque showed malice that negated defence*

The respondents ('plaintiffs') were the partners of a firm of solicitors and were customers of the appellant ('defendant') of which they maintained a current account. On 18 June 2008, the plaintiffs deposited in the said account
E four EON Bank cheques at the defendant's branch. The EON Bank cheques had been paid by EON Bank since 19 June 2008, but had only been credited to the said account by the defendant on 11 July 2008. On 9 July 2008, before the EON Bank cheques cleared, the plaintiffs issued a CIMB Islamic Cheque ('the CIMB Islamic Cheque') but the cheque was dishonoured when
F presented for payment by PW3 and a return cheque advice dated 11 July 2008 with the remark 'refer to drawer' was issued to PW3. In response to the plaintiffs' inquiry, the defendant explained that they had difficulties in their cheque clearing system and consequently, RM100 had been refunded to the said account. Dissatisfied, the plaintiffs instituted an action against the defendant claiming, *inter alia*, that the defendant had (i) acted negligently in
G failing to clear the EON Bank cheques and subsequently, in dishonouring the CIMB Islamic cheque; (ii) breached its contract with the plaintiffs; and (iii) committed the tort of libel by causing the publication of the remarks 'refer to drawer'. The High Court Judge ('HCJ') decided in the plaintiffs' favour and hence, this appeal on the grounds that: (i) the HCJ erred in law
H and in fact in failing to appreciate that the plaintiffs were under a duty to ensure that there were sufficient funds in the said account before proceeding to issue any cheques; (ii) the HCJ erred in fact in disregarding the fact that the delay in clearing the four EON Bank cheques deposited in the defendant's account was caused by the Cheque Truncation Conversion System ('CTCS');
I (iii) the HCJ erred in law and in fact in holding that the defendant had acted

with malice and the defendant was accordingly not entitled to rely on the defence of qualified privilege; and (iv) the HCJ erred in the assessment of damages.

Held (allowing appeal in part)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) It is trite that the relationship between a bank and its customer is that of principal and agent. Consequently, where a cheque is drawn on the banker by the customer, it represents the order of the principal to the agent to pay out the principal money in its custody, the amount stated on the cheque to the payee endorsed on the cheque. It follows, therefore, that a cause of action will accrue where the bank refuses to pay a customer's cheque when in fact he has to his credit at least an amount equivalent to that endorsed on the cheque he/she has issued on his/her account with the bank. Such act by the bank in dishonouring the cheque or a refusal to pay constitutes a breach of contract for which the banker is liable in damages. (para 12)

(2) The bank's obligation to honour its customer's payment order is subject to certain qualifications, *inter alia*, that the customer must have funds at the bank to satisfy the payment order. The funds must be sufficient to enable the bank to effect payment of the entire sum. If they are insufficient, the bank is not bound to effect partial payment. Funds must also be sufficient as at the date on which the bank is obliged to effect payment. (para 13)

(3) The HCJ was correct in arriving at the conclusion that: (i) the EON Bank cheques were paid by EON Bank since 19 June 2008; (ii) the cheques were cleared within three or four days; (iii) the defendant was informed by the plaintiffs concerning an urgent need for the clearance of the CIMB Islamic cheques; and (iv) the defendant owed a duty of care to the plaintiffs to ensure that the EON Bank cheques were credited into the account which were only credited on 11 July 2008, a day after the defendant dishonoured the CIMB Islamic cheques. The defendant had failed to discharge the onus to show that the HCJ had misdirected herself in failing to take into account relevant evidence or taking into account irrelevant evidence. Therefore, there was no cogent reason to disturb the findings of the HCJ. (para 15)

(4) The defendant owed the duty of care to manage the account of the plaintiffs reasonably and diligently. The failure on the part of the defendant to credit the payment of the EON Bank cheques within three working days was a clear act of negligence and breach of duty. The defendant had failed to offer a satisfactory explanation for the delay for

A the clearance of the CIMB Islamic cheque. The contention that the delay was due to the CTCS problem was rejected because such problem was the defendant's internal management problem. (paras 16 & 18)

(5) It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered, and no party should be B permitted to travel beyond its pleading and that all the necessary and material facts should be pleaded by the party in support of the case set up by it. The points pertaining to the issue that the plaintiffs had breached the Solicitors' Account Rules 1990 ('the Rules') was not a mere development of what had been alleged and it was not already C admitted in the evidence before the trial court. Hence, the plaintiffs did not have the opportunity of addressing the truth and accuracy of that fact. Therefore, the HCJ was correct in disregarding the fact that PW2 had breached the Rules. (paras 21 & 22)

(6) The delay of paying the client's money did not detract the negligence of D the defendant for the failure to credit the payment of the EON Bank cheques in time. There was no link between the negligence of the defendant and the time of paying the client. The action against the defendant was the negligence of the defendant in the failure to credit the payment in time. (para 23)

E **(7)** The remarks 'refer to drawer' were published for no other reason than that the insufficient funds in the said account prevented the defendant from honouring the CIMB Islamic cheque. Therefore, there was no libel in the remarks. Further, the defendant had demonstrated that the defendant had a duty to publish the remarks 'Refer to Drawer' whereas F PW3 had an interest in receiving such communication. Therefore, the defendant was entitled to rely on the defence of qualified privilege. (paras 25 & 32)

(8) The fault on the part of the defendant to credit the cheques within three or four working days where the said account appeared to lack sufficient G fund and the publication of the remarks 'refer to drawer' was not malice that negated the defence of a qualified privilege. Given the honest belief of the defendant that the said account could not be utilised to pay the CIMB Islamic cheque, the defendant could fairly be said to consider itself obliged to communicate its decision, a decision in which the H plaintiffs were necessarily interested. (para 37)

(9) The plaintiffs were traders and not merely an ordinary individual and were therefore entitled for a substantial but reasonable damages for injury to their images, reputations and trusts. Hence, taking into consideration all the surrounding circumstances of the injury suffered by I the plaintiffs, a reasonable and fair general damages was RM15,000. (paras 42 & 44)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden ('plaintif-plaintif') adalah rakan kongsi sebuah firma peguamcara dan adalah pelanggan-pelanggan perayu ('defendan') di mana mereka mempunyai akaun semasa. Pada 18 Jun 2008, plaintif-plaintif mendepositkan empat cek EON Bank ke dalam akaun tersebut di cawangan defendan. Cek-cek EON Bank tersebut telah dibayar oleh EON Bank semenjak 19 Jun 2008, tetapi hanya dikreditkan ke dalam akaun tersebut oleh defendan pada 11 Julai 2008. Pada 9 Julai 2008, sebelum cek-cek EON Bank ditunaikan, plaintif-plaintif mengeluarkan suatu cek CIMB Islamic ('cek CIMB Islamic') tetapi cek tersebut tidak laku apabila dikemukakan untuk bayaran oleh PW3 dan nota pengembalian cek bertarikh 11 Julai 2008 dengan catatan 'refer to drawer' dikeluarkan kepada PW3. Sebagai jawapan kepada pertanyaan plaintif-plaintif, defendan menjelaskan bahawa mereka mengalami masalah dalam sistem penunaian cek mereka dan dengan itu, RM100 dikembalikan ke dalam akaun tersebut. Tidak berpuas hati, plaintif-plaintif memulakan satu tindakan terhadap defendan menuntut, antara lain, bahawa defendan telah (i) bertindak secara cuai kerana gagal menunaikan cek EON Bank dan kemudian, menyahlakukan cek CIMB Islamic; (ii) melanggar kontraknya dengan plaintif-plaintif; (iii) melakukan tort libel dengan menyebabkan penerbitan catatan 'refer to drawer'. Hakim Mahkamah Tinggi ('HMT') memutuskan memihak kepada plaintif-plaintif dan dengan itu rayuan ini atas alasan-alasan bahawa: (i) HMT terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa plaintif-plaintif mempunyai kewajipan untuk memastikan bahawa terdapat wang yang mencukupi dalam akaun tersebut sebelum meneruskan untuk mengeluarkan apa-apa cek; (ii) HMT terkhilaf dari segi fakta apabila gagal mengambil kira fakta bahawa kelewatan menunaikan empat cek EON Bank yang didepositkan dalam akaun defendan adalah disebabkan oleh Cheque Truncation Conversion System ('CTCS'); (iii) HMT terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa defendan telah bertindak dengan niat jahat dan defendan oleh itu tidak berhak untuk menyandar kepada pembelaan perlindungan bersyarat; dan (iv) HMT terkhilaf dalam penilaian ganti rugi.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Adalah matan bahawa hubungan antara bank dan pelanggannya adalah sama seperti prinsipal dan ejen. Oleh itu, di mana cek ditunaikan terhadap bank oleh pelanggannya, ia mewakili perintah prinsipal kepada ejen untuk membayar wang pokok dalam milikannya, jumlah yang dinyatakan pada cek tersebut kepada penerima yang diendorskan pada cek tersebut. Berikutan itu, kausa tindakan akan terakru di mana bank enggan membayar cek pelanggannya apabila sebenarnya dia perlu

mengkreditkan sekurang-kurangnya satu jumlah yang setara dengan jumlah yang diendorskan pada cek yang dikeluarkan terhadap akaunnya dengan bank tersebut. Tindakan sedemikian oleh bank dalam menyahlakukan cek atau keengganan membayar membentuk pelanggaran kontrak yang mewajarkan bank bertanggungan bagi ganti rugi.

(2) Walau bagaimanapun, kewajipan bank untuk menunaikan perintah bayaran pelanggan adalah tertakluk kepada syarat tertentu, antara lain, bahawa pelanggan mesti mempunyai dana yang mencukupi dalam bank untuk memenuhi perintah bayaran. Dana tersebut perlu mencukupi untuk bank membayar keseluruhan jumlah. Jika ia tidak mencukupi, bank tidak terikat untuk membayar sebahagian daripada jumlah tersebut. Dana juga perlu mencukupi pada tarikh di mana bank wajib membuat bayaran.

(3) HMT adalah betul apabila mencapai kesimpulan bahawa: (i) cek-cek EON Bank dibayar oleh EON Bank semenjak 19 Jun 2008; (ii) cek-cek tersebut dijelaskan dalam tempoh tiga atau empat hari; (iii) defendan diberitahu oleh plaintif-plaintif mengenai keperluan segera untuk menunaikan cek-cek CIMB Islamic; dan (iv) defendan mempunyai kewajipan berjaga-jaga kepada plaintif-plaintif untuk memastikan bahawa cek-cek EON Bank telah dikreditkan ke dalam akaun yang hanya telah dikreditkan pada 11 Julai 2008, sehari selepas defendan menyahlakukan cek CIMB Islamic. Defendan telah gagal melepaskan beban untuk menunjukkan bahawa HMT telah tersalah arah kerana gagal mempertimbangkan keterangan yang relevan atau mengambil kira keterangan yang tidak relevan. Oleh itu, tiada alasan yang kukuh untuk mengganggu dapatan HMT.

(4) Defendan mempunyai kewajipan berjaga-jaga untuk menguruskan akaun plaintif-plaintif secara munasabah dan cekap. Kegagalan pihak defendan untuk mengkreditkan bayaran cek-cek EON Bank dalam tempoh tiga hari bekerja adalah tindakan jelas kecuaian dan pelanggaran kewajipan. Defendan telah gagal memberikan penjelasan yang memuaskan bagi kelewatan penunaian cek CIMB Islamic. Hujahan bahawa kelewatan adalah disebabkan oleh masalah CTCS ditolak kerana masalah sedemikian adalah masalah pengurusan dalaman defendan.

(5) Adalah matan bahawa tanpa pliding, keterangan, jika ada, yang dikemukakan oleh pihak-pihak tidak boleh dipertimbangkan, dan tidak ada pihak yang dibenarkan bersandar melampaui pliding dan kesemua fakta yang perlu dan penting sepatutnya diplidkan oleh pihak-pihak dalam menyokong kes yang dibina olehnya. Perkara berkaitan dengan isu bahawa plaintif-plaintif telah melanggar Kaedah-Kaedah Akaun Peguamcara 1990 ('Kaedah-Kaedah') bukan semata-mata perkembangan

bagi apa yang telah didakwa dan tidak diterima sebagai keterangan di mahkamah bicara. Oleh itu, plaintif-plaintif tidak mempunyai peluang untuk mengemukakan kebenaran dan ketepatan fakta tersebut. Dengan itu, HMT adalah betul dalam tidak mempertimbangkan fakta bahawa PW2 telah melanggar Kaedah-Kaedah.

(6) Kelewatan membayar wang pelanggan tidak menjejaskan kecuaian defendan bagi kegagalan untuk mengkreditkan bayaran cek-cek EON Bank menurut tempoh. Tidak ada kaitan antara kecuaian defendan dan tempoh bayaran kepada pelanggan. Tindakan terhadap defendan adalah kecuaian defendan dalam kegagalan mengkreditkan bayaran dalam tempoh yang ditetapkan.

(7) Catatan 'refer to drawer' dibuat untuk tujuan yang bukan selain daripada bahawa dana yang tidak mencukupi dalam akaun menghalang defendan daripada menunaikan cek CIMB Islamic. Oleh itu, tidak ada libel dalam catatan tersebut. Selanjutnya, defendan telah menunjukkan bahawa defendan mempunyai kewajipan untuk membuat catatan 'refer to drawer' sementara PW3 mempunyai kepentingan untuk menerima komunikasi tersebut. Dengan itu, defendan berhak untuk menyandar kepada pembelaan perlindungan bersyarat.

(8) Kesalahan pada pihak defendan untuk mengkreditkan cek-cek tersebut dalam tempoh tiga atau empat hari bekerja di mana akaun tersebut jelas tidak mempunyai dana yang mencukupi dan pembuatan catatan 'refer to drawer' bukan dengan niat jahat yang menafikan pembelaan perlindungan bersyarat. Memandangkan defendan dengan sejujurnya percaya bahawa akaun tersebut tidak boleh digunakan untuk membayar cek CIMB Islamic, defendan dengan adil boleh dikatakan telah menganggap ia berkewajipan untuk memberitahu keputusannya, keputusan yang mana plaintif-plaintif mempunyai kepentingan yang perlu.

(9) Plaintif-plaintif adalah ahli-ahli perniagaan dan bukan semata-mata individu biasa dan oleh itu berhak bagi ganti rugi yang substansial tetapi munasabah bagi kerugian kepada imej, reputasi dan amanah mereka. Oleh itu, mempertimbangkan kesemua hal keadaan kerugian yang dialami oleh plaintif-plaintif, ganti rugi yang munasabah dan adil adalah RM15,000.

Case(s) referred to:

Adam v. Ward [1917] AC 309 ***(refd)***
Aktas v. Westpac Banking Corporation Ltd [2010] HCA 25 ***(refd)***
Barclays Bank v. Simms (WJ) and Cooke (Southern) Ltd [1980] 1 QB 677 ***(refd)***
Bashford v. Information Australia (Newsletters) Pty Ltd [2004] HCA 5 ***(refd)***
Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd [2008] 5 CLJ 737 CA ***(refd)***
Horrocks v. Lowe [1975] AC 135 ***(refd)***
London Joint Stock Bank v. Macmillan and Arthur [1918] AC 777 ***(refd)***
Metro Charm Sdn Bhd v. Lee Nyan Hon & Brothers Sdn Bhd & Anor [2008] 7 CLJ 60 HC ***(refd)***

A *Roberts v. Bass [2002] HCA 57* ***(refd)***
Rouse v. Bradford Banking Co [1894] AC 586 ***(refd)***
Spring v. Guardian Assurance Plc 1994 3 WLR 354 ***(refd)***
Tan Ah Sam v. Chartered Bank [1970] 1 LNS 153 FC ***(refd)***
Toogood v. Spyring [1834] 149 ER 1044 ***(refd)***

B **Legislation referred to:**
Bills of Exchange Act 1949, s. 55(1)(a)
Solicitors' Account Rules 1990, r. 3

Other source(s) referred to:
Gatley on Libel and Slander, 7th edn, p 281
Paget's Law of Banking, 13th edn, para 18.9

C *For the appellant - Rabindra Nathan (Lukas Lim & Yeoh Wan Xin with him); M/s Shearn Delamore & Co*
For the respondent - Muhammad Faiz Fadzil (Ahmad Faiq Azizan with him); M/s Faiz Fadzil & Co

D *[Editor's note: For the High Court judgment, please see Mohd Saufi Taib & Ors v. CIMB Islamic Bank Bhd [2014] 1 CLJ 774 (overruled in part).]*

Reported by S Barathi

JUDGMENT

E **Mohd Zawawi Salleh JCA:**

Introduction

[1] This is an appeal from the decision of the learned judge of the High Court at Kuala Lumpur allowing the respondents' claims for RM275,000 F with costs.

[2] Having heard and carefully considered the submissions of the respective parties, we allowed the appeal in part.

[3] We now set out the reasons for our decisions.

G **[4]** For convenience, the parties will be referred to as they were in the High Court. Accordingly, in this judgment, the appellant, CIMB Islamic Bank Berhad, is referred to as "the defendant" and the respondents, Mohd Saufi bin Taib, Surya Putra bin Mohamed Taulan and Mohd Syairusrohan bin Md Sehan, are referred to as "the plaintiffs".

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Facts

[5] The facts which give rise to this appeal are not much in dispute and can be shortly stated as follows:

I (a) The plaintiffs are the partners of a firm of solicitors, Messrs Saufi, Putra & Associates.

(b) The defendant is a public company which carry out the banking business and has a branch at Block 8, Kompleks Pejabat Kerajaan, Jalan Duta, Kuala Lumpur.

(c) The plaintiffs are the defendant's customers of which they maintained a Current Account No. 1418-0000022-10-2 ("the said account"). The said account is a client account established under the Legal Profession Act 1976 and its regulations.

(d) On 18 June 2008, the plaintiffs deposited in the said account four EON bank cheques at the defendant's branch in Shah Alam. The EON bank cheques had been paid by EON Bank since 19 June 2008, but only been credited to the said account by the defendant on 11 July 2008.

(e) On 9 July 2008, before the EON bank cheques cleared, the plaintiffs issued a CIMB Islamic cheque ("the CIMB Islamic cheque"). The CIMB Islamic cheque was dishonoured when presented for payment by PW3 and a return cheque advice dated 11 July 2008 with the remark "refer to drawer" was issued to PW3.

(f) Thereafter, the plaintiffs had sent a letter dated 23 July 2008 to the defendant requiring an explanation. There is no response until the defendant's Group Chief Executive sent a letter dated 24 July 2008 explaining that they had difficulties in their cheque clearing system and consequently, RM100 had been refunded to the said account.

(g) Dissatisfied with the conduct of the defendant, the plaintiffs instituted an action at the High Court. The plaintiffs' claims are three fold, namely, the defendant:

(i) acted negligently in failing to clear the EON cheques and subsequently, in dishonouring the CIMB Islamic cheque;

(ii) breached its contract with the plaintiffs; and

(iii) committed the tort of libel by causing the publication of the remarks "refer to drawer".

Findings Of The High Court

[6] The learned judge decided in the plaintiffs' favour. The principal findings of the High Court were these:

(i) the defendant had a common law duty to the plaintiffs to clear the EON cheques within three days and to honour the CIMB Islamic cheque, and the defendant was negligent in failing to carry out these duties;

(ii) the failure of the defendant to clear the EON cheques and honour the CIMB Islamic cheque was a breach of a contract with the plaintiffs; and

(iii) the publication of the remarks "refer to drawer" was a libel committed by the defendant.

The Appeal

[7] Before us, the arguments on which the judgment of High Court is assailed are that:

(a) the learned judge erred in law and in fact in failing to appreciate that the plaintiffs were under a duty to ensure that there were sufficient funds in the said account before proceeding to issue any cheques;

(b) the learned judge erred in fact in disregarding the fact that the delay in clearing the four EON Bank cheques deposited in the defendant's account was caused by the Cheque Truncation Conversion System (CTCS);

(c) the learned judge erred in law and in fact in holding that the defendant had acted with malice and the defendant was accordingly not entitled to rely on the defence of qualified privilege; and

(d) the learned judge erred in the assessment of damages.

Our Findings

Grounds (a) And (b)

[8] We propose to deal with the grounds (a) and (b) together because they are related.

[9] Learned counsel for the defendant submitted that the learned judge failed to appreciate that the defendant was the paying bank in relation to the CIMB Islamic cheque. A paying bank is a bank that has a duty to honour cheques drawn upon the bank by its customers. A paying bank is entitled to decline payment on a cheque when there are insufficient funds in the account. (See *Rouse v. Bradford Banking Co* [1894] AC 586; *Barclays Bank v. Simms (WJ) and Cooke (Southern) Ltd* [1980] 1 QB 677; *London Joint Stock Bank v. Macmillan and Arthur* [1918] AC 777; *Tan Ah Sam v. Chartered Bank* [1970] 1 LNS 153; [1971] 1 MLJ 28; *Metro Charm Sdn Bhd v. Lee Nyan Hon & Brothers Sdn Bhd & Anor* [2008] 7 CLJ 60; [2007] 5 MLJ 272; s. 55(1)(a) of the Bills of Exchange Act 1949).

[10] According to learned counsel, the defendant had adduced sufficient evidence to show that the plaintiffs were well aware of the insufficient funds in the said account. Therefore, the defendant was not under a duty to honour the CIMB Islamic cheque and was in fact entitled to dishonour the cheque.

[11] In reply, learned counsel for the plaintiffs contended that the plaintiffs have a legitimate expectation that EON Bank cheques had been credited in time to the said account as EON Bank had paid for almost 22 days. The

plaintiffs have made a reasonable step to verify the sufficiency of the fund and they had given notice *via* call log that they have to issue the cheque soonest. It is the duty of the defendant to meet the payment since EON Bank had paid them. Therefore, the defendant should be fully blamed for dishonouring the CIMB Islamic cheques.

[12] We begin by stating the applicable law to the grounds (a) and (b). It is trite from a long list of authorities that the relationship between a bank and its customer is that of principal and agent. Consequently, where a cheque is drawn on the banker by the customer, it represents the order of the principal to the agent to pay out the principal money in its custody, the amount stated on the cheque to the payee endorsed on the cheque. It follows, therefore, that a cause of action will accrue where the bank refuses to pay a customer's cheque when in fact he has to his credit at least an amount equivalent to that endorsed on the cheque he/she has issued on his/her account with the bank. Such act by the bank in dishonouring the cheque or refusal to pay constitutes a breach of contract for which the banker is liable in damages.

[13] It is also established that the bank's obligation to honour its customer's payment order is, however, subject to certain qualifications, *inter alia*, that the customer must have funds at the bank to satisfy the payment order. The funds must be sufficient to enable the bank to effect payment of the entire sum. If they are insufficient, the bank is not bound to effect partial payment. Funds must also be sufficient as at the date on which the bank is obliged to effect payment. (See *London Joint Stock Bank v. Macmillan and Arthur (supra)*).

[14] As to the availability (as opposed to the sufficiency) of funds, *Paget's Law of Banking*, 13th edn, at para 18.9, under the rubric "availability of funds", states as follows:

> 18.9 Funds may be sufficient but not available in at least two circumstances. The first is where the bank has a right to combine accounts. It was said in *Garnett v. M'Kewan* that the customer must be taken to know the state of each of his accounts and if the balance on the whole is against him or does not equal the cheques he draws, he has no right to expect those cheques to be cashed. The right of combination is, of course, subject to contrary agreement …
>
> Second, money is not available immediately it is paid in. The position today in relation to cash and cheques is as follows:
>
> Cash will normally be credited to an account instantaneously if the bank has a real time system. If not, the credit may not appear on the account until the following day. Cheques paid in at the account holding branch and drawn on another account at the same branch should also receive instant credit for interest and available balance purposes. **All other cheques should clear within three working days, counting the day of payment in as day one.** (emphasis added).

[15] We are of the view that the learned judge's findings of fact and law that:

(i) the EON Bank cheques were paid by EON Bank since 19 June 2008;

(ii) the cheques were cleared within three or four days;

(iii) the defendant were informed by the plaintiffs concerning urgent need for the clearance of the CIMB Islamic cheques; and

(iv) the defendant owed a duty of care to the plaintiffs to ensure that the EON Bank cheques were credited into the account which were only credited on 11 July 2008, a day after the defendant dishonoured the CIMB Islamic cheques,

are correct. We are satisfied that the learned judge had carefully considered and evaluated all the evidence in arriving at her conclusion. It is trite that the trial judge may believe or disbelieve, accredit or disregard, any evidence introduced before the court. The trial judge is not only the judge of a witness' credibility, but also the judge of the weight to be attached to the evidence. The onus is on the defendant to show that the learned judge misdirected herself in failing to take into account relevant evidence or taking into account irrelevant evidence. The defendant has failed to do so. Therefore, there is no cogent reason to disturb the findings of the learned judge.

[16] We entirely agree with the learned judge's conclusion that the failure on the part of the defendant to credit the payment of the EON Bank cheques within three working days was a clear act of negligence and breach of duty. The defendant owed the duty of care to manage the account of the plaintiffs reasonably and diligently. We have difficulty in comprehending why so simple transaction should take 22 days to do so. The defendant has failed to offer a satisfactory explanation for the delay for the clearance of the CIMB Islamic cheque.

[17] The defendant's duty to exercise reasonable care and skill in regard to its customer's affair is well established. The law is stated thus:

> A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer. (See Cress well et al: *Encyclopaedia of Banking Law C.21, Selangor United Rubber Estate Ltd. v. Cradock (No. 3)* [1968] 2 All ER 1073).

[18] We reject, as did the learned judge, that the delay was due to CTCS problem. This is because such problem is the defendant's internal management problem which was nothing to do with the plaintiffs.

[19] In the light of our findings at para. 15-18, we should sustain the findings of the learned judge.

[20] Learned counsel for the defendant strenuously contended that the learned judge failed to consider the points relating to the breach of the Solicitors, Account Rules 1990 ("the Rules") by the plaintiffs. According to learned counsel, it was in the evidence that the EON cheques were issued upon cash being received from different clients. That being the case, there is a breach of r. 3 of the Rules when the cash received from clients was not banked immediately into the client account. It was argued had the defendant adhered to the Rules, there should have been sufficient funds in the said account for the issuance of the CIMB Islamic cheque, regardless of whether the EON cheques were cleared.

[21] With respect, the submission is misconceived. The points were not pleaded. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all the necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial, it is imperative that the party shall state the essential material facts so that the other party may not be taken by surprise. Further, an argument on a point of law cannot be entertained without the factual foundation for it existing on the record.

[22] We are of the opinion that the points pertaining to the issue that the plaintiffs had breached the Rules were not a mere development of what had been alleged and it was not already admitted in the evidence before the trial court. The plaintiffs did not have the opportunity of addressing the truth and accuracy of that fact. Therefore, the learned judge was right in disregarding the fact that PW2 had breached the Solicitors' Account Rules 1990.

[23] We are of the opinion that the delay of paying the client's money did not detract the negligent of the defendant for the failure to credit the payment of the EON Bank cheques in time. There is no link between the negligence of the defendant and the time of paying the client. The action against the defendant is the negligence of the defendant in the failure to credit the payment in time.

[24] For these reasons, the grounds (a) and (b) must fail.

Issue (c): Defence Of Qualified Privilege

[25] Learned counsel for the defendant submitted that the remarks "refer to drawer" were published for no other reason than that the insufficient funds in the said account prevented the defendant from honouring the CIMB Islamic cheque. Therefore, there was no libel in the remarks.

[26] We agree with the submission. In our respectful view, the High Court was wrong in deciding that the defendant cannot rely on the defence of qualified privilege.

[27] The authoritative judicial description of common law qualified privilege was made by Baron Parke in the English decision of *Toogood v. Spyring* [1834] 149 ER 1044:

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

[28] In *Bashford v. Information Australia (Newsletters) Pty Ltd* [2004] HCA 5, McHugh J had this to say:

> [A plea of qualified privilege] confesses the publication of defamatory matter, but contends that the publication is immune from liability because the public interest requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation.

[29] The circumstances that constitute a privilege occasion can never be catalogued and rendered exact. There are no rigid categories "of qualified privilege". The usual formulation is that where a publication is made:

(a) pursuant to a legal, social or moral duty to a person with a corresponding duty or interest;

(b) for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest; or

(c) to a person who shares a common interest in the subject.

(See *Adam v. Ward* [1917] AC 309 at 334 (per Lord Atkinson)).

[30] In *Aktas v. Westpac Banking Corporation Limited* [2010] HCA 25, the High Court of Australia held that the defence of qualified privilege would be applicable only if the following elements are met:

(a) There was an occasion for the allegedly defamatory communication to be made;

(b) There is a duty or interest in making the allegedly defamatory communication; and

(c) There is a duty or interest on the part of the payee of the cheque to receive information.

[31] The High Court of Australia held that dishonour of a cheque presented for payment only needs to be communicated if it cannot be met. Where a cheque presented for payment cannot be met, then the bank has a duty and an interest to communicate its inability to pay, and the payee also would then have an interest in receiving such a communication. No such interest exists where the drawer of the cheque has funds sufficient to meet the payment. The court further held that the defence of qualified privilege would not be available when the occasion for the defamatory communication was created by the mistake of the person making the communication.

[32] We agree with the submission of learned counsel for the defendant that the defendant has demonstrated in the court below that the defendant had a duty to publish the remarks "refer to drawer" whereas PW3 had an interest in receiving such communication. Therefore, the defendant is entitled to rely on the defence of qualified privilege.

[33] It is trite that the defence of qualified privilege can only be defeated if the plaintiffs can show that there was malice on the part of the defendant. The burden to establish malice is on the plaintiffs. It is not responsibility of the defendant to prove to court, what it published against the plaintiffs was devoid of malice. (See *Gatley on Libel and Slander*, 7th edn. at p. 281).

[34] The evidence on record shows that the plaintiffs failed to prove malice by demonstrating that the defendant did not believe in the truth of the allegedly defamatory remark and the defendant, at the time of the allegedly defamatory remark, was not minded to observe any duty or interest common to him and to the plaintiff.

[35] It is clear from the authorities that in order to defeat the defence of qualified privilege, it is not enough to show that the defendant dislike the plaintiffs and knew the remark would injure the plaintiffs. In *Horrocks v. Lowe* [1975] AC 135, Lord Diplock observed:

> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will

A have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in *bona fide* protection of his own legitimate interests.

Lord Diplock continued (at pp. 150-151) to hold:

B Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve C defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with D the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.

[36] In *Roberts v. Bass* [2002] HCA 57; [2002] 212 CLR I, the court articulated the principles of concerning malice as follows:

E [79] … malice means a motive for, or a purpose of, defaming the plaintiff that is inconsistent with the duty or interest that protects the occasion of the publication. …

…

F [84] In exceptional cases, the sheer recklessness of the defendant in making the defamatory statement, may justify a finding of malice. In other cases, recklessness in combination with other factors may persuade the court that the publication was actuated by malice. In the law of qualified privilege, as in other areas of the law, the defendant's recklessness may be so gross as to constitute wilful blindness, which the law will treat as G equivalent to knowledge. …

…

[103] Carelessness of expression or carelessness in making a defamatory statement never provides a ground for inferring malice. The law of qualified privilege requires the defendant to use the occasion honestly in H the sense of using it for a proper purpose; but it imposes no requirement that the defendant use the occasion carefully. Even irrationality, stupidity or refusal to face facts concerning the plaintiff is not conclusive proof of malice although in 'an extreme' case it may be evidence of it. And mere failure to make inquiries or apologies or correct the untruth when discovered is not evidence of malice.

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[37] Applying the law in the authorities cited, in our view, the fault on the part of the defendant to credit the cheques within three or four working days where the said account appeared to lack sufficient fund and the publication of the remarks "refer to drawer" is not malice that negates the defence of a qualified privilege. Given the honest belief of the defendant that the said account could not be utilised to pay the CIMB Islamic cheque, the defendant could fairly be said to consider itself obliged to communicate its decision, a decision in which the plaintiffs were necessary interested.

[38] For the above reasons, we resolved the ground (c) in favour of the defendant.

Issue (d): Assessment Of Damages

[39] In the light of our decision in respect of the ground (c) that the defendant can avail itself of the defence qualified privilege, the plaintiffs are not entitled to claim for damages for defamation.

[40] The learned judge awarded RM275,000 for the general damages for both actions – negligence (failure to credit the EON Bank cheques in time) and defamation (the remarks of "refer to drawer" of CIMB Islamic Cheque). In the light the court's decision in respect of the ground (c), the amount awarded by the High Court should be reduced.

[41] Now, the award of general damages is a matter which is entirely at the discretion of the trial court and appellate court will not interfere with such award unless:

(a) the trial court acted under mistake of law;

(b) the trial court has acted in disregard of principles;

(c) the trial court has taken into account irrelevant matters or failed to take into account relevant matters;

(d) where the amount awarded is either ridiculously low or ridiculously high; or

(e) where injustice will result.

[42] In this instant appeal, we agree with the submission of learned counsel for the plaintiffs that the plaintiffs are traders and not merely an ordinary individual and therefore entitled for a substantial but reasonable damages for injury to their images, reputations and trusts. (See *Bumiputra-Commerce Bank Bhd v. Top-APlastic Sdn Bhd* [2008] 5 CLJ 737).

[43] *Paget's Law of Banking* 13th edn, at para 18.19 notes that "the credit of a customer may be seriously injured by the wrongful dishonour of a cheque and in so far as that may be a breach of contract, the customer's claim is for general damages in respect of injury to this reputation". The decision

of the House of Lord in *Spring v. Guardian Assurance Plc and Others* 1994 3 WLR 354, at 384 Letter C, per Lord Slynn and at 399 Letter C, per Lord Woof, suggest that in a claim of this nature in negligence, the primary head (but not necessarily sole head) of damage is economic loss.

[44] After taking into consideration all the surrounding circumstances of the injury suffered by the plaintiffs, we are of the opinion that a reasonable and fair general damages is RM15,000.

Conclusion

[45] The appeal was allowed in part as follows:

(a) The appeal in respect of the defendant's breach of its duty of care and breach of contract was dismissed;

(b) The appeal in respect of libel was allowed;

(c) The general damages awarded by the learned judge in the sum of RM275,000 was reduced to RM15,000;

(d) The deposit was refunded to the defendant; and

(e) As agreed by the parties, no order as to costs.